

The 1984 Bankruptcy Amendments—Another Flawed Compromise

I. INTRODUCTION

In June of 1984 Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("Amendments").¹ The Amendments were a direct response to the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*² The Court, in a plurality opinion, had held that the broad grant of jurisdiction to bankruptcy judges provided by the Bankruptcy Reform Act of 1978 ("Reform Act") violated article III of the Constitution.³ The jurisdictional grant in the Reform Act gave bankruptcy judges broad powers but did not protect them with life tenure and prohibitions against reductions in salary, the essential protections of the independence of federal courts exercising the judicial power of the United States.⁴

Congress began hearings to determine how to correct the flaw in the jurisdictional grant less than three weeks after the *Northern Pipeline* decision.⁵ Despite urgings from bankruptcy judges, practitioners, scholars, and creditors' groups, Congress declined to cure the defect by extending article III status to bankruptcy judges.⁶ The solution adopted by Congress in the 1984 Amendments relegates bankruptcy courts to a role as adjuncts to the district courts.⁷ Congress granted jurisdiction over bankruptcy proceedings to the district courts, which may refer certain proceedings to the bankruptcy courts.⁸ This solution to the constitutionality problem is a hybrid between the pre-Reform Act referee system and a more limited version of the Reform Act's broad jurisdictional grant.

1. The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, tit. I, 98 Stat. 333 (to be codified in scattered sections of 11 U.S.C. & 28 U.S.C.) [hereinafter cited as Amendments].

2. 458 U.S. 50 (1982).

3. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 n.40 (1982). The Bankruptcy Reform Act, Pub. L. No. 95-598, tit. II, § 241(a), 92 Stat. 2657, 2668 (1978) (codified at 28 U.S.C. § 1471 (1982)), granted the bankruptcy court "all of the jurisdiction conferred by this section on the district courts." (emphasis added). The Court held that this grant violated article III of the Constitution. Article III requires that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office." U.S. CONST. art. III, § 1. Four opinions were written. Justice Brennan's plurality opinion, joined by Justices Marshall, Blackmun, and Stevens, must be read with the much narrower concurring opinion of Justice Rehnquist, joined by Justice O'Connor, to ascertain what the Court actually held. Justice Rehnquist viewed as unconstitutional "so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's [claims arising under state law] . . ." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 91 (1982). See *infra* note 49.

4. See Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297 (1982) (proposing that article III must be read literally, with the conclusion that life tenure and salary protections are mandatory requirements for the bankruptcy courts). For an in-depth discussion of *Northern Pipeline's* possible ramifications for administrative agencies and other article I courts, see Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197 (1983).

5. *Northern Pipeline Bankruptcy Decision*, 1982: *Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1 (1982) [hereinafter cited as *Hearings*].

6. See *infra* subpart IV (A).

7. See *infra* notes 111-17 and accompanying text. See also S. REP. NO. 989, 95th Cong., 2d Sess. 16, 17, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5802-03.

8. See *infra* notes 118-23 and accompanying text.

This Note will briefly examine bankruptcy courts' jurisdiction prior to 1978⁹ and the Reform Act's broad jurisdictional grant, focusing on the problems in the bankruptcy system that Congress intended the broad jurisdictional grant to solve.¹⁰ The *Northern Pipeline* decision, invalidating the Reform Act's jurisdictional grant, will be considered.¹¹ After briefly examining the Emergency Rule,¹² this Note will review the options available to Congress, particularly that of extending article III status to the bankruptcy judgeships.¹³ Finally, this Note will evaluate the new jurisdictional grant and procedures of the 1984 Amendments.¹⁴ Two major questions are considered: first, whether the 1984 Amendments solve the constitutional dilemma posed by *Northern Pipeline*; and second, whether the 1984 Amendments meet the original goals of the broad jurisdictional grant of the Reform Act.

A. Pre-1978 Bankruptcy System

Prior to the Reform Act, the district courts were the bankruptcy courts.¹⁵ The district courts had original jurisdiction over all matters and proceedings in bankruptcy;¹⁶ however, the district courts could refer to bankruptcy referees any "pure bankruptcy" questions.¹⁷ Generally, the bankruptcy referees could hear adversarial claims in either of two circumstances:¹⁸ when the parties consented to the bankruptcy referee's jurisdiction,¹⁹ and when the bankruptcy court exercised summary (as opposed to plenary) jurisdiction because the claim related to property over which the court exercised direct control.²⁰

The referee system's jurisdictional basis proved problematic. The distinction between plenary and summary jurisdiction, an issue of constant litigation, wasted both time and money.²¹ Often the sole function of a trial was to determine whether

9. See *infra* subpart I(A).

10. See *infra* subpart I(B).

11. See *infra* part II.

12. See *infra* notes 63-65.

13. See *infra* parts III-IV.

14. See *infra* part V.

15. See 1 COLLIER ON BANKRUPTCY 14 ed. (MB) ¶ 1.10 (1968).

16. 28 U.S.C. § 1334 (1982) (current version at 28 U.S.C.A. § 1334(a) (West Supp. 1985)). For the version to have been implemented by the Reform Act, see 28 U.S.C. § 1334 (1982). This version never took effect, and was eliminated by the 1984 Amendments. Pub. L. 98-353, § 122(c), tit. I, 98 Stat. 346.

17. S. Ct. R. Bankr. P. 102(a). (1982). The reference procedure was changed so that the clerk automatically referred the case to a referee without any involvement by the district court. The district court judge could act on a case only after withdrawing it for cause.

18. H.R. REP. NO. 595, 95th Cong., 2d Sess. 4, 8, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 5965, 5969 [hereinafter cited as HOUSE REPORT].

19. The bankruptcy courts were restricted from hearing suits which could not have been brought in the bankruptcy court absent the bankruptcy unless the parties consented. *E.g.*, *Williams v. Austrian*, 331 U.S. 642 (1947). See also 2 COLLIER ON BANKRUPTCY 14 ed. (MB) ¶ 23.14 (1974).

20. See 1 COLLIER ON BANKRUPTCY 15 ed. (MB) ¶ 3.01 pp. 3-22 (1985).

21. S. REP. NO. 989, 95th Cong., 2d Sess. 17, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5803 [hereinafter cited as SENATE REPORT]. See also Note, *Scope of Summary Jurisdiction of the Bankruptcy Court*, 40 COLUM. L. REV. 489, 490 n.2 (1940) (litigation over the issue of plenary/summary jurisdiction appeared in every volume of the Federal Reporter and Federal Supplement between 1898 and 1940). This situation remained unchanged, and was a major concern of the Reform Act. HOUSE REPORT, *supra* note 18, at 45 n.27, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6006-07. See also HOUSE COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137 (Part I & II), 93d Cong., 1st Sess. 88-92 (1973).

the bankruptcy referee was empowered to hear the claim.²² Moreover, jurisdiction by consent often resulted in cases in which a party unknowingly consented to the bankruptcy court's jurisdiction.²³ The process became known as "jurisdiction by ambush" among bankruptcy litigants.²⁴

The wasteful and confusing fragmentation of jurisdiction was a major problem of the pre-1978 system which the Reform Act attempted to solve.²⁵ Often a bankruptcy question remained unsettled for a considerable period of time pending the outcome of a question that had to be tried in the district or state court.²⁶ These excessive delays posed a very real problem, prejudicing the parties, debtors and creditors alike. In most bankruptcies a debtor, either an individual or a corporate entity, is in poor financial shape and fighting for survival. Quite often a quick resolution of issues is essential if the debtor is to form a plan to pay creditors or reorganize in time to survive. The protections provided by Congress in Title 11 are intended to provide the judicial machinery for a speedy resolution of the issues and to safeguard creditors from any further deterioration of the assets of the estate.²⁷ Of course, creditors are best protected by measures which assist the debtor in recovering so that the debts can be paid. But when recovery is not forthcoming, a speedy winding up and distribution of the debtor's estate is the next best thing for the creditors' protection.

The jurisdictional snafus in the pre-Reform Act bankruptcy system were also very costly for litigants.²⁸ Frequently, a claim had to be litigated practically in its entirety just to determine which court could hear it.²⁹ Often the debtor's estate had to litigate issues in state court, district court, and bankruptcy court.³⁰ The cost of litigating in three different forums is clearly more burdensome than litigating in a single bankruptcy forum, empowered to hear all the claims.

In the final analysis, the costs of excessive litigation are borne by the unsecured creditors. Any cost incurred by the estate in defending or pursuing any claim of or against the debtor merely diminishes the estate so that fewer assets are available upon a final distribution to the unsecured creditors. For these reasons, another major goal of the Reform Act was to grant bankruptcy judges the power to hear and determine all bankruptcy problems quickly and cost-efficiently in a single forum.³¹

22. SENATE REPORT, *supra* note 21, at 17, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5803.

23. Consent could be express, implied, or by failure to enter a proper objection. *See generally* 2 COLLIER ON BANKRUPTCY 14 ed. (MB) ¶ 23.06 (1974).

24. HOUSE REPORT, *supra* note 18, at 43, 49, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6004, 6010.

25. The Reform Act was intended to eliminate the summary/plenary jurisdiction dichotomy entirely. SENATE REPORT, *supra* note 21, at 18, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5804.

26. *Id.* at 17, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5803.

27. *See infra* note 35.

28. HOUSE REPORT, *supra* note 18, at 49, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 6010.

29. *Id.*

30. SENATE REPORT, *supra* note 21, at 17-18, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5803-04.

31. *Id.*

B. *Bankruptcy Reform Act of 1978*

The Bankruptcy Reform Act of 1978³² constituted the first major revision of bankruptcy law since the Chandler Act of 1938.³³ The Reform Act was the product of years of discussion and consideration by both houses of Congress of how to streamline the burgeoning bankruptcy process.³⁴ The result was a major revision in both substance and procedure.³⁵

Congress was concerned with attracting the highest quality individuals to the bankruptcy bench, to enable the bankruptcy courts to keep pace with the major substantive revisions of bankruptcy law and the important role the system played in regulating debtor-creditor rights and in commerce in general.³⁶ The district courts, burdened by their own overcrowded dockets,³⁷ were simply unable to handle the massive bankruptcy workload. In addition, the bankruptcy system had come to rely on the expertise of the referees to handle the intricacies of bankruptcy, since the district courts had to focus their attentions on other, often more esoteric, matters clogging their calendars.³⁸ The reality was that the bankruptcy system was already acting with de facto independence.³⁹ For these reasons, upgrading the status of bankruptcy judges became an essential component of any major revision in bankruptcy law or procedure.

Article III status for the judges was urged by many, and favored by the House, as the best way to upgrade the status of bankruptcy judges and attract the most qualified candidates.⁴⁰ The prevailing Senate view, however, opposed risking the disruption of the current federal judiciary by granting article III protections to bankruptcy judges.⁴¹

Bankruptcy cases now underway involve billions of dollars, hundreds of thousands of debtors and creditors, and complex legal issues.⁴² The sheer volume of cases

32. Pub. L. No. 95-598, 92 Stat. 2549 (codified at scattered provisions of 11 and 28 U.S.C.) [hereinafter referred to as Reform Act].

33. Pub. L. No. 75-696, 52 Stat. 840 (1938) (repealed by the Reform Act).

34. For a detailed examination of the lengthy legislative process involved in passage of the Reform Act, see Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941 (1979).

35. See generally Eisen & Smrtnik, *The Bankruptcy Reform Act of 1978—An Elevated Judiciary*, 28 DE PAUL L. REV. 1007 (1979).

36. HOUSE REPORT, *supra* note 18, at 49, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6010.

37. *Id.* at 4, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5965.

38. *Id.* at 9, 14, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5970, 5975 (noting that the Bankruptcy Commission and the Judicial Conference both recognized the lack of interest among district judges in bankruptcy matters). See *infra* notes 43-44 and accompanying text for the number of case filings in each court system.

39. *Id.*

40. See HOUSE REPORT, *supra* note 18, at 52, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6013-14. The House position was stated very clearly as it was introduced in its compromise form:

The principal area of disagreement between the House and Senate dealt with the structure of the court system. It was the House position that the bankruptcy court should be an independent article III court in every sense of the word, as are the U.S. district courts. It was the House position, after extensive debate and argument on the floor, that we would have separate, independent, and life-tenured judges in the bankruptcy courts.

Id. 124 CONG. REC. 32,391 (1978) (statement of Congressman Butler).

41. 124 CONG. REC. 28,258 (1978) (statement of Sen. DeConcini). For an examination of the lengthy legislative process culminating in the Reform Act, see Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941 (1979).

42. Congressman Rodino opened floor debate on the Reform Act by noting the enormous volume of bankruptcy cases. He noted that the bankruptcy system had far outgrown its status as contemplated by existing legislation, processing

supports the claim that the highest quality individuals are needed to serve as bankruptcy judges. Between June 30, 1982, and July 1, 1983, 535,597 bankruptcy cases were filed; 171,623 adversary proceedings were filed in those bankruptcy cases.⁴³ During the same time period, only 276,523 civil and criminal cases combined were filed in the entire federal district court system.⁴⁴ Although the Senate's position opposing granting article III status to the bankruptcy judgeships prevailed, the broad grant of jurisdiction in the Reform Act was nevertheless intended to upgrade the status and prestige of the bankruptcy judgeships. Surely the litigants in the bankruptcy court system are entitled to have judges of the highest quality hear and decide their claims.⁴⁵

II. THE NORTHERN PIPELINE DECISION

The *Northern Pipeline* decision did little to clarify a confusing area of constitutional law.⁴⁶ The question of what limitations article III places on Congress' power to establish article I courts is both confusing and beyond the scope of this Note.⁴⁷ What is clear is that the Supreme Court in *Northern Pipeline* intended that Congress restructure the jurisdictional grant to bankruptcy courts in a way that would meet the legislative purpose of the Reform Act and conform to the requirements of article III.⁴⁸ *Northern Pipeline*, however, provided Congress with little guidance as to what restructuring article III required.⁴⁹ Four separate opinions were written, and the reasoning and constitutional analysis in each are confusing.⁵⁰ Reading the plurality and concurring opinions together, a majority of the Supreme Court agreed that it was unconstitutional for a bankruptcy court to exercise the judicial power of the United States in determining a claim based in contract law when the judge does not have the

over 250,000 cases per year, involving more than nine million creditors, over 27 billion dollars in assets, and over 43 billion dollars in claims. He further observed that the total number of cases filed in bankruptcy courts exceeded the combined number of civil and criminal cases filed in the federal courts. 123 CONG. REC. 35,444 (1977).

43. JUDICIAL CONFERENCE OF THE UNITED STATES REPORT, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 418, 428 (1983). This was an increase from the 519,063 bankruptcy filings and 94,632 adversary proceedings filed in 1981. JUDICIAL CONFERENCE OF THE UNITED STATES REPORT, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 240, 242 (1981).

44. *Id.* at 122, 164.

45. For a complete discussion of the status issue, see Eisen & Smrtnik, *The Bankruptcy Reform Act of 1978—An Elevated Judiciary*, 28 DE PAUL L. REV. 1007 (1979).

46. The entire area of constitutional limitations on non-article III courts is problematic. In an earlier plurality opinion, *Glidden Co. v. Zdanok*, Justice Harlan remarked that the distinction in cases between "'constitutional' and 'legislative' courts has been productive of much confusion and controversy." 370 U.S. 530, 534 (1962). Rather than clearing up any confusion, *Northern Pipeline* added to it. Professor Redish has observed that "[a]ll four opinions written in the decision are plagued by questionable reasoning. Each, in varying degrees, adopts guidelines for allocating authority between article III and non-article III bodies which are without legitimate basis in logic or in constitutional language, history, or policy." Redish, *Legislative Courts, Administrative Agencies, and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 200 (1983). Professor Redish further noted that, at the least, Congress would face serious problems trying to restructure the bankruptcy courts to conform with article III after *Northern Pipeline*, and that the ramifications may be much greater if Justice Brennan's analysis is applicable to all article I courts. Professor Redish concluded that if the reasoning of the Court is extended to its logical conclusion, much of the work done by federal administrative agencies may be unconstitutional. *Id.*

47. For an examination of how *Northern Pipeline* might affect this question, see Redish, *supra* note 46, and Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOKLYN L. REV. 207 (1983).

48. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982).

49. Fullerton, *supra* note 47, at 227. See generally Redish, *supra* note 46. Only Chief Justice Burger's dissent contained any advice for Congress. See *infra* text accompanying note 144.

50. See *supra* note 46. See also Fullerton, *supra* note 47.

protections of life tenure and a prohibition against reduction of salary required by article III.⁵¹ Only article III judges can exercise the judicial power of the United States and enter final judgements on state law claims.⁵² The broad grant of jurisdiction in the Reform Act over "all civil proceedings arising under Title 11 or arising in or related to cases under Title 11" was thus unconstitutional.⁵³

The constitutional dilemma posed by *Northern Pipeline* was further complicated because any invalid part of the jurisdictional grant to bankruptcy courts was inseparable from any arguably valid grant of jurisdiction.⁵⁴ The entire grant of jurisdiction was thus held unconstitutional due to the impossibility of severing the invalid part.⁵⁵ This inseparability, added to the lack of a majority position, left unclear what changes in the jurisdictional grant to bankruptcy judges were required to pass constitutional muster.⁵⁶

III. THE EMERGENCY RULE

The *Northern Pipeline* case was decided on June 28, 1982.⁵⁷ The Supreme Court stayed the effect of the decision until October 4, 1982, so that Congress could rectify the constitutionality problem without totally disrupting the operation of the bankruptcy courts.⁵⁸ However, as Congress had already considered the problem for years,⁵⁹ no solution was forthcoming from that body in just three months.⁶⁰ When the first deadline was not met, the Supreme Court extended the stay through December 24, 1982.⁶¹

When it became clear that Congress would not meet the second deadline,⁶² the Judicial Conference drafted the Sample Order and Model Rule for the Continued Operation of the Bankruptcy Courts ("Emergency Rule").⁶³ This permitted the

51. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982). See *supra* note 3. For Chief Justice Burger's statement of the Court's holding in his dissent, see *infra* text accompanying note 144.

52. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982). See U.S. CONST. art. III, § 1; *supra* note 3.

53. 28 U.S.C. § 1471(c) (1982), *repealed* by the 1984 Amendments, Pub. L. 98-353, tit. I, 98 Stat. 333 (1984).

54. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 91-92 (1982).

55. *Id.* at 87-88 n.40 (1982). Justice Rehnquist's concurring opinion is far narrower than the public/private rights dichotomy stressed by the plurality. After making the limits of both his concurrence and his analysis clear, he concurred in the judgment "because [he] agree[d] with the plurality that this grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts under § 1471" *Id.* at 91-92 (Rehnquist, J., concurring).

56. See *supra* notes 46, 49.

57. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

58. *Id.* at 88.

59. Congress first established a commission in 1970, fourteen years prior to the Amendments, to recommend the needed changes in bankruptcy law. COMM'N ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, Pt. 1, 93rd Cong., 1st Sess. 6 (1973). (Part 1 deals mainly with bankruptcy administration and the court system.) For a detailed examination of the legislative deliberations culminating in the Reform Act, see Klee, *supra* note 34.

60. Ironically, the 1984 Amendments were finally passed on June 29, 1984, exactly two years after the Supreme Court decided *Northern Pipeline* on June 28, 1982. See 130 CONG. REC. H7489, S8887 (daily ed. June 29, 1984), *reprinted* in 1984 U.S. CODE CONG. & AD. NEWS 576, 581.

61. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 459 U.S. 813 (1982).

62. On December 23, 1983, the Court refused to grant a further extension when the second extension expired. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.* 459 U.S. 1094 (1983).

63. 11 U.S.C. app. at 521 (1982) [hereinafter cited as Emergency Rule].

bankruptcy courts to continue operating until Congress took action.⁶⁴ The Emergency Rule was drafted with due precaution towards the constitutional limitations of *Northern Pipeline*.⁶⁵

The Judicial Conference proposed three main restrictions on the bankruptcy courts' authority in the Emergency Rule. The first precautionary measure required distinguishing between a traditional bankruptcy proceeding and a related proceeding.⁶⁶ A bankruptcy judge could not issue a binding judgment in a related proceeding.⁶⁷ In any related proceeding findings of fact and proposed rulings were to be submitted to the district court judge for de novo review.⁶⁸ Section (d)(3)(A) of the Emergency Rule provided:

Related proceedings are those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or state court. Related proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate A proceeding is not a related proceeding merely because the outcome will be affected by state law.⁶⁹

A second measure in the Emergency Rule, incorporated to assure constitutional compliance, was a grant of authority to the district court to revoke the referral of any case to the bankruptcy court.⁷⁰ This could be done upon the request of a party or upon the court's own motion.⁷¹ A third measure provided that the district court did not have to defer to the factual findings or interpretations of law made by the bankruptcy judge, even in traditional bankruptcy proceedings.⁷²

IV. LEGISLATIVE SOLUTIONS TO THE JURISDICTIONAL DILEMMA

The jurisdictional problems recognized by *Northern Pipeline* were not anticipated by Congress.⁷³ Senator Heflin opened the hearings of the Senate Judiciary Committee on the *Northern Pipeline* decision by noting that the Reform Act was the culmination of years of joint effort by the House and Senate to streamline the bankruptcy process to end the unnecessary expense and delay that had plagued the

64. The Emergency Rule was promulgated to avoid a complete shutdown of the bankruptcy court system. After *Northern Pipeline* it was frequently argued that the entire grant of jurisdiction of both the bankruptcy courts and the district courts over any bankruptcy matter was invalidated. See *In re Kaiser*, 722 F.2d 1574, 1577 (2d Cir. 1983). Although most courts rejected the argument that district courts did not retain jurisdiction over bankruptcy matters following *Northern Pipeline*, e.g., *Kaiser*, some courts ruled that the federal courts were completely without bankruptcy jurisdiction after *Northern Pipeline*, e.g., *In re Conley*, 26 Bankr. 885 (Bankr. M.D. Tenn. 1983); *Winters Nat'l Bank & Trust Co. v. Schear Group*, 25 Bankr. 463 (Bankr. S.D. Ohio 1982).

65. Acceptance of the Emergency Rule was far from uniform. The Court of Appeals for the Third Circuit refused to apply the Emergency Rule's requirement of de novo review of the bankruptcy judge's findings, holding in favor of the clearly erroneous standard adopted in the bankruptcy rules prior to *Northern Pipeline*. *In re Morrissey*, 717 F.2d 100, 104 (3d Cir. 1983). *Contra* 1616 Reminc Limited Partnership v. Atchinson & Kellar Co., 704 F.2d 1313, 1314 (4th Cir. 1983).

66. Emergency Rule, *supra* note 63, at 521(c), 522(d)(3)(A).

67. *Id.* at 522(d)(3)(B).

68. *Id.* at 522(e)(2)(B).

69. *Id.* at 522(d)(3)(A).

70. *Id.* at 521(c)(2).

71. *Id.*

72. *Id.* at 522(e)(2)(B).

73. *Hearings*, *supra* note 5, at 1.

fragmented jurisdiction of the pre-Reform Act system.⁷⁴ Senator Heflin read a prepared statement of Senator Dole in which Senator Dole referred to the resulting jurisdictional grant in the Reform Act as a "flawed compromise which has returned to haunt the Congress."⁷⁵

In *Northern Pipeline*, the Supreme Court left to Congress the task of restructuring the bankruptcy court system to conform to the requirements of article III "in the way that [would] best effectuate the legislative purpose."⁷⁶ A number of alternative solutions to the jurisdictional dilemma could have been adopted. One solution would have reconstituted the bankruptcy court system as a system of article III courts. Another possibility advocated a return to some version of the pre-Reform Act system of plenary/summary jurisdiction, placing bankruptcy judges under the control of the article III district court judges. A third possible solution was retention of the broad jurisdictional grant of the Reform Act, adding sufficient limitations on the power of bankruptcy judges to conform with the requirements of *Northern Pipeline*. The solution Congress included in the 1984 Amendments seems to be a combination of the last two.

Each option had its advantages and disadvantages, its proponents and detractors. The next part of this Note will examine the choices in light of the goals of the Reform Act, the constitutional requirements of *Northern Pipeline*, and the practical effects of each proposal on the federal judiciary and litigants in the bankruptcy system.

A. Article III Status

The quickest, clearest, and simplest way to eliminate any constitutional uncertainties in the authority of bankruptcy courts would be to confer article III status upon the judges.⁷⁷ Article III status would place the power to adjudicate fully all problems in a bankruptcy case in a single forum,⁷⁸ fulfilling a major goal of the Reform Act by eliminating excessive delays caused by fragmented jurisdiction and jurisdictional disputes.⁷⁹ Article III status would also enhance the prestige of bankruptcy judge-ships.⁸⁰ The status and prestige of a seat on the federal bench are clearly important incentives in attracting the highest quality judicial candidates.⁸¹ Because cases in bankruptcy courts today involve billions of dollars, hundreds of thousands of debtors and creditors, and weighty and complex legal and social issues, attracting high caliber judges is essential to the establishment of the efficient, far-reaching bankruptcy system envisioned by Title 11 and the Reform Act.⁸²

74. *Id.* at 2.

75. *Id.*

76. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 n.40 (1982).

77. For an example of the position favoring article III bankruptcy courts, see King, *Bankruptcy Code—Specialized Court Supported*, 52 AM. BANKR. L.J. 193 (1978).

78. HOUSE REPORT, *supra* note 18, at 49, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6010.

79. *Id.*

80. *Id.*

81. *Id.* See also SENATE REPORT, *supra* note 21, at 17.

82. See King, *supra* note 77, at 196-97; See also Eisen & Smrtnik, *supra* note 35.

The so-called bankruptcy bar, lawyers who spend much if not most of their time on bankruptcies, almost unanimously favored article III status.⁸³ Their major concern was that judicial authority be placed in one forum so that decisions that need to be made in a bankruptcy can be made with speed and certainty.⁸⁴ Often speedy decisions are essential to the survival of a debtor in bankruptcy; unnecessary costs and delays spent in jurisdictional disputes do not help provide a debtor the legal relief envisioned by the bankruptcy code.⁸⁵

The major opponents of article III status legislation were the federal judges of the Judicial Conference of the United States.⁸⁶ The American College of Trial Lawyers also was opposed and advanced three major arguments against article III status for bankruptcy judges. First, establishing specialized federal courts with article III protections dilutes and violates the concept of a single federal trial court of general jurisdiction.⁸⁷ Second, the prestige, traditions, and collegiality of the existing federal judiciary would be threatened.⁸⁸ Last, creating a large number of article III judges with life tenure and salary protection when the continuation of the current heavy bankruptcy workload is questionable might limit Congress' flexibility in managing the federal court system because changes in the economy or other unpredictable factors may significantly alter the bankruptcy workload in the future.⁸⁹

The first argument against article III status for the bankruptcy courts, that the concept of a single federal trial court of general jurisdiction must be maintained and protected, is not compelling for a number of reasons. The practical reality is that bankruptcy courts are already functioning as a distinct judicial unit.⁹⁰ Moreover, the immensity of both the district courts' and the bankruptcy courts' workload is such that it is impossible to entertain any realistic notion that bankruptcy cases can be handled

83. See, e.g., *Hearings*, *supra* note 5, at 123 (testimony of Joseph E. Friend, President of the Commercial Law League of America), *reprinted in* 87 Com. L.J. 395, 395-97 (1982).

84. *Id.*

85. See *Hearings*, *supra* note 5, at 181, *reprinted in* 87 Com. L.J. 395, 397. Friend's testimony quoted the testimony of Harold Marsh, Chairman of the Commission on the Bankruptcy Laws of the United States as follows:

It is absolutely essential that there be expedition in the determination of bankruptcy proceedings.

The reason for that is the time value of money. If every controversy had to be docketed in the Federal District Court and put on the calendar and taken up at the end whenever it came up on the calendar, then most bankruptcy proceedings would not be worth carrying on because there would be nothing left at the end of that process.

Hearings, *supra* note 5, at 181, *reprinted in* 87 Com. L.J. 395, 397 (1982).

86. See *Hearings*, *supra* note 5, at 371-426.

87. See *id.* at 227-29 (statement of the American College of Trial Lawyers). The American College's statement made reference to the statement of Simon Rifkind, a former federal judge, who previously submitted this argument on behalf of the American College of Trial Lawyers. *Id.* at 237-40. Rifkind's statement was published in a short article, along with Professor Lawrence King's response. Rifkind, *Bankruptcy Code—Specialized Court Opposed*, 52 AM. BANKR. L.J. 187, 187-91 (1978); King, *Bankruptcy Code—Specialized Court Supported*, *id.* at 193, 193-97 (1978).

88. See *Hearings*, *supra* note 5, at 229-30 (statement of American College of Trial Lawyers); Rifkind, *supra* note 87, at 189-90.

89. See *Hearings*, *supra* note 5, at 228-29 (statement of American College of Trial Lawyers). It should be noted that the increase in the number of bankruptcies coincides with the tremendous boom in our society's use of credit. Credit and bankruptcy go hand in hand, bankruptcy being the down side of a well-entrenched economic practice. As long as credit continues to play the pervasive economic role it does today, there is no real reason to expect any substantial decline in bankruptcy filings. See Cyr, *Structuring a New Bankruptcy Court: A Comparative Analysis*, 52 AM. BANKR. L.J. 141, 142 (1978).

90. See King, *supra* note 87, at 193-94.

in the district courts.⁹¹ Furthermore, Congress intended the Reform Act to advance the "establishment of a functionally independent bankruptcy court."⁹² At the conclusion of hearings on the administrative structure of bankruptcy courts, Subcommittee Chairman Don Edwards observed that segments of the federal judiciary are ignoring the reality of the situation:

For the last five or six years, we have been hearing witnesses—banks, commercial law representatives, merchants, business people, and the general public complaining about the referee system. Actually, we have not had one witness, *except the district judges*, who have said that it's working well and that we should be proud of it.⁹³

The second argument—concern with their traditions, collegiality, and prestige—ignores the importance of a debtor's right to a time- and cost-efficient reorganization or discharge and a creditor's right to a swift liquidation of a bankrupt estate. This self-serving concern ignores the simple fact that unnecessary costs and delays hinder an efficient determination of litigants' rights and ultimately results in a reduction of the assets of an estate available for distribution to creditors.⁹⁴

The Reform Act clearly recognized the enhanced role bankruptcy law plays in commerce today.⁹⁵ It is clear that one goal of the Reform Act was to enhance the prestige of bankruptcy judgeships so that the most highly qualified candidates would be attracted to the position.⁹⁶ One committee noted that "[t]he importance and difficulty of issues coming before the bankruptcy judges will be entirely comparable to those coming before the United States district court judges and judges of state courts of general jurisdiction."⁹⁷ Clearly, the increased prestige of bankruptcy judges is necessary and deserved in light of the role bankruptcy litigation now plays in society. Absent persuasive countervailing reasons, bestowing article III status on bankruptcy judges is the best, and constitutionally surest, way to establish an efficient, capable bankruptcy system with sufficient powers to do the job it was intended to do. The argument that increasing the prestige of bankruptcy judges to article III status would injure the prestige or traditions of the federal judiciary is self-serving and simply unpersuasive.⁹⁸

More persuasive arguments against article III status for the bankruptcy judges were the additional expense that would result from a large-scale upgrade in status and the limited time that Congress had in which to formulate an appropriate plan.⁹⁹ The

91. See *supra* text accompanying notes 37–39, 43–44.

92. S. REP. NO. 989, 93d Cong., 2d Sess. 347 (1978). See also *id.* at 345–46.

93. *Id.* (emphasis added).

94. See *supra* note 5.

95. HOUSE REPORT, *supra* note 18, at 49, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6010. See also REPORT OF THE SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., REPORT ON HEARINGS ON THE COURT ADMINISTRATIVE STRUCTURE FOR BANKRUPTCY CASES 368 (Comm. Print 1978).

96. See 124 CONG. REC. 28,258 (1978) (statement of Sen. DeConcini introducing the final compromise legislation).

97. HOUSE REPORT, *supra* note 18, at 49, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6010.

98. See SUBCOMM. ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE COMM. ON THE JUDICIARY, 95TH CONG., 2D SESS., REPORT ON HEARINGS ON THE COURT ADMINISTRATIVE STRUCTURE FOR BANKRUPTCY CASES 368 (Comm. Print 1978).

99. The final form of the Reform Act legislation was a compromise. Senator Thurmond stated: "I want to see bankruptcy reform in this session of Congress, but I [am] unwilling to accept legislation that would lead to an excessive cost to the government and an unreasonable expansion of the federal bureaucracy." 124 CONG. REC. 34,019 (1978).

“wholesale” creation of over 200 article III judgeships having life tenure was not particularly attractive to some members of Congress.¹⁰⁰ The number of bankruptcy judges needed might fluctuate with the economy or other unpredictable factors.¹⁰¹ The life tenure requirement would eliminate to some degree Congress’ flexibility in shaping the federal judiciary, and the costs would clearly be somewhat higher due to increased salary and pension requirements. Finally, the prospect of finding enough qualified candidates in a short amount of time posed yet another obstacle.¹⁰²

However, the practical problems were not insurmountable, and many cost-minimizing ideas were presented to Congress. For instance, although an article III judge must be appointed with life tenure, the judgeship need not be refilled upon vacancy if not required by the workload.¹⁰³ Thus, any new article III bankruptcy judgeships could have been self-expiring. Another idea advocated establishing in each district a limited number of article III bankruptcy judges.¹⁰⁴ An appropriate number of non-article III bankruptcy judges would have remained under the authority of the article III bankruptcy judges. The non-article III judges would not have life tenure. Flexibility thus could have been maintained in case the need for active judges decreased significantly or if some other circumstance compelled a restructuring of the court system. Yet another idea called for establishing an entirely independent U.S. bankruptcy court system with article III judges in the bankruptcy appellate division and non-article III bankruptcy judges in the trial court division.¹⁰⁵ Bankruptcy judges’ salaries and benefits would be kept lower than those of the district judges.¹⁰⁶ This would help to alleviate two of the major pressures against establishing article III judgeships. First, it would help minimize the long term costs which would be incurred by creating a large number of higher paying, life-tenure judgeships. Second, it might help ease the tension for the district court judges by preserving for them higher pay and thus higher status.

Congress could have devised some plan creating article III judgeships in the bankruptcy court system which would have minimized the practical obstacles. A solution using some form of article III bankruptcy judgeship would have provided a single forum for a full adjudication of bankruptcy cases, solved the constitutionality problem, and achieved an important goal of the Reform Act by firmly establishing the independence of the bankruptcy court system.

Apparently Senator Thurmond, a powerful legislator, was a major force behind the Senate’s objections to article III status for bankruptcy judges. See Klee, *Legislative History of the New Bankruptcy Law*, 28 DE PAUL L. REV. 941, 954 (1979).

100. See Rifkind, *supra* note 87, at 190.

101. See *Hearings*, *supra* note 5, at 228–29 (statement of American College of Trial Lawyers); see also *id.* at 237 (testimony of Simon H. Rifkind).

102. *Id.* at 228, 240; see also Rifkind, *supra* note 87, at 191.

103. See *Hearings*, *supra* note 5, at 122 (testimony of Professor Lawrence King).

104. *Id.* at 292–93, 300–01.

105. Cyr, *Structuring a New Bankruptcy Court: A Comparative Analysis*, 52 AM. BANKR. L.J. 141, 152–53 (1978).

106. See *Hearings*, *supra* note 5, at 296.

B. Return to a Form of the Referee System

Because the broad jurisdictional grant in the Reform Act was intended to cure some major problems with the referee system, Congress gave little serious consideration to returning to the referee system's plenary/summary jurisdiction dichotomy and "stepchild" court structure.¹⁰⁷ However, the bankruptcy system after the 1984 Amendments is quite similar to the referee system in many ways.

Many of the procedural provisions in the 1984 Amendments were intended to prohibit the bankruptcy courts from hearing claims which would put their jurisdiction in jeopardy of exceeding the article III limitations on their powers. These provisions provide that a bankruptcy court may hear any core bankruptcy proceeding but must abstain from hearing any non-core proceedings.¹⁰⁸ However, if a non-core proceeding is "related to" a case under Title 11, the bankruptcy judge may hear the claim but may only propose findings of fact and conclusions of law to the district court.¹⁰⁹ Litigation over attempts to interpret and apply these provisions will surely produce the same results as did litigation over plenary and summary jurisdiction in the referee system.¹¹⁰

V. THE 1984 AMENDMENTS' SOLUTIONS TO THE JURISDICTIONAL DILEMMA

Congress chose to solve the jurisdictional dilemma posed by *Northern Pipeline* by placing the jurisdiction over bankruptcy and related proceedings in the article III district courts. Two methods were used in the attempt to assure constitutionality. First, Congress reconstituted the bankruptcy courts, emphasizing their role as adjuncts to the district courts.¹¹¹ The jurisdictional grant is made directly to the district courts in an attempt to establish the adjunct character of the bankruptcy courts.¹¹² Second, the proceedings a bankruptcy judge may hear are restricted: the bankruptcy court is not empowered to enter final determinations in certain proceedings, absent consent of the parties.¹¹³ By these measures, the district courts alone are purportedly

107. *Id.* at 275-77.

108. 28 U.S.C.A. § 157(b)(1) (West Supp. 1985).

109. *Id.* § 157(c)(1).

110. Referring to the broad language in § 157 defining "core proceedings," the President of the Commercial Law League of America noted that "there will be ample, frequent, and, unfortunately expensive litigation over the proper court in which to hear a particular case." Chatz & Schumm, *1984 Bankruptcy Code Amendments—Fresh from the Anvil*, 89 Com. L.J. 317, 321 (1984).

111. See generally 28 U.S.C.A. §§ 1334, 151, 158 (West Supp. 1985). See also *id.* § 152(a)(1), (b)(1), § 157(a), (c)(1), (c)(2), (d).

112. 28 U.S.C.A. § 1334(a) & (b) (West Supp. 1985) (providing that the district court shall have "original and exclusive jurisdiction of all cases under title 11" and "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11"). It is interesting to note that these provisions are not new. They are taken verbatim from 28 U.S.C. § 1471(a) & (b) (1982), respectively (as added by § 241(a) of the Reform Act), and were not eliminated entirely by § 114 of the 1984 Amendments, but were merely moved from Title 28, chapter 90 (District Courts and Bankruptcy Courts) to chapter 85 (District Courts' Jurisdiction).

113. See generally 28 U.S.C. § 157 (West Supp. 1985). The district court is required to hear any personal injury tort claims or wrongful death claims. *Id.* § 157(b)(2)(B), (b)(5). A bankruptcy court may only make proposed findings of fact and conclusions of law in "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." *Id.* § 157(c)(1). Fifteen matters common to bankruptcy litigation are listed as "core proceedings." *Id.* § 157(b)(2). See *infra* note 131. The fifteen items are not exclusive, and a "determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by state law." 28 U.S.C.A. § 157(b)(3) (West Supp. 1985). See also *id.* § 1334.

exercising the judicial power, and the requirements of article III are presumably met.

The 1984 Amendments establish the bankruptcy judges as units of the district court in each judicial district.¹¹⁴ The bankruptcy judges are considered judicial officers of the article III district court.¹¹⁵ They are appointed for fourteen-year terms by the court of appeals of the respective circuit after considering recommendations by the Judicial Conference.¹¹⁶ The provision allowing the bankruptcy courts to exercise "all" of the jurisdiction conferred upon the district courts is eliminated.¹¹⁷ In addition, jurisdiction over a debtor's property now lies in the district courts rather than in the bankruptcy courts.¹¹⁸ These provisions indicate a compromise between the Reform Act's goal of establishing an independent bankruptcy court system and the constitutional requirement of maintaining bankruptcy courts that are truly adjunct to the district courts.

Original jurisdiction over all cases and civil proceedings arising under Title 11 is now in the district courts.¹¹⁹ The district court may provide that any or all such cases be referred to a bankruptcy judge.¹²⁰ Consequently, a bankruptcy court will get its cases only by referral from the article III district court.¹²¹ The referral is clearly optional,¹²² and the district court may withdraw any case or proceeding so referred at any time for cause shown, on its own motion, or on that of any party.¹²³ The idea is to survive constitutional scrutiny by reestablishing the dominance of the article III district courts over any proceeding in bankruptcy courts.

In a key provision, the Amendments restrict the types of cases or proceedings that the bankruptcy judges may hear.¹²⁴ For instance, personal injury tort and wrongful death claims must now be tried in the district courts.¹²⁵ District judges may refer to bankruptcy judges only cases under Title 11, proceedings arising under Title 11, proceedings arising in a case under Title 11, or proceedings related to a case under Title 11.¹²⁶ Of these, a bankruptcy judge may only "hear and determine all cases

114. 28 U.S.C.A. § 151 (West Supp. 1985).

115. *Id.* § 152(a)(1).

116. *Id.* The appointment by the court of appeals amended the Reform Act's provision for the President to appoint the bankruptcy judges. That provision never took effect. While the Court never discussed the appointment feature in *Northern Pipeline*, it is clear that Congress believed appointments by the Judiciary would help establish the adjunctness of the bankruptcy courts. On the other hand, Congress also provided for greater independence from the district courts by placing the appointment power in the courts of appeal rather than the district courts, as was the case prior to the Reform Act. The fourteen-year terms are another compromise between a separate, independent bankruptcy system and a truly adjunct system.

117. 28 U.S.C. § 1471(c) (1982) *repealed* by Pub. L. 98-353, tit. I, § 114, July 10, 1984, 98 Stat. 343. The provision in the Reform Act which granted broad jurisdiction to the bankruptcy judges and was thus held unconstitutional provided that "[t]he bankruptcy court for the district in which a case under title 11 is commenced shall exercise *all* of the jurisdiction conferred by this section on the district courts." *Id.* (emphasis added).

118. 28 U.S.C.A. § 1334(d) (West Supp. 1985). Exclusive jurisdiction over the debtor's estate was granted to the bankruptcy court by the Reform Act. 28 U.S.C. § 1471(e) (1982).

119. 28 U.S.C.A. § 1334(a) & (b) (West Supp. 1985).

120. *Id.* § 157(a).

121. *Id.* § 157(b)(1).

122. *See id.* § 157(a).

123. *Id.* § 157(d).

124. *Id.* § 157(b)(1).

125. *Id.* § 157(b)(2)(B), (b)(5).

126. *Id.* § 157(a).

under [T]itle 11 and all core proceedings arising under [T]itle 11, or arising in a case under [T]itle 11.”¹²⁷ In these cases and core proceedings, the bankruptcy judge will be making final orders subject only to review in the district courts under the traditional “clearly erroneous” standard.¹²⁸ In cases and proceedings in which the bankruptcy court is empowered to enter final judgments, it takes appeals in the same manner as courts of appeals review decisions of district courts in civil proceedings.¹²⁹

A. Core versus Non-Core Proceedings

Congress intended the distinction between “core” and “non-core” proceedings to ensure that the non-article III bankruptcy courts do not determine claims when jurisdiction is independent of a “public right” created by Congress in Title 11.¹³⁰ Sixteen proceedings common to a bankruptcy are listed as nonexclusive examples of core proceedings.¹³¹ The provision further provides that a determination whether a proceeding is core or non-core is not to be made solely on the basis that its resolution may be affected by state law.¹³² Any “related, but non-core” state law claim may not be heard in the federal court if the federal courts have no basis for jurisdiction other than the bankruptcy proceeding and an action could be timely adjudicated in an appropriate state forum.¹³³ In this way constitutional requirements are ostensibly met.

The new provisions will prevent bankruptcy judges from making final determinations in non-core proceedings.¹³⁴ In a non-core proceeding that is otherwise related to a case under Title 11, a bankruptcy judge may only propose findings of fact and conclusions of law to the district court.¹³⁵ The district judge is then to enter any final orders or judgments after considering the proposed findings and conclusions and reviewing de novo “those matters to which [a] party has timely and specifically

127. *Id.* § 157(b)(1). See *infra* note 131.

128. 28 U.S.C.A. § 158(a)(2) (West Supp. 1985).

129. *Id.* § 158(c).

130. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 63–76 (1982).

131. 28 U.S.C.A. § 157(b)(2) (West Supp. 1985), provides:

Core proceedings include, but are not limited to—(A) matters concerning the administration of the estate; (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11; (C) counterclaims by the estate against persons filing claims against the estate; (D) orders in respect to obtaining credit; (E) orders to turn over property of the estate; (F) proceedings to determine, avoid, or recover preferences; (G) motions to terminate, annul or modify the automatic stay; (H) proceedings to determine, avoid, or recover fraudulent conveyances; (I) determinations as to the dischargeability of particular debts; (J) objections to discharges; (K) determinations of the validity, extent, or priority of liens; (L) confirmations of plans; (M) orders approving the use or lease of property, including the use of cash collateral; (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and (O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship except personal injury tort or wrongful death claims.

132. *Id.* § 157(b)(3).

133. *Id.* § 1334(c)(2).

134. *Id.* § 157(b)(3). See, e.g., *Morse Electric Co. v. Logicon, Inc.*, 47 Bankr. 234, 238 (Bankr. N.D. Ind. 1985); *Macon Prestressed Concrete Co. v. Duke*, 46 Bankr. 727 (Bankr. M.D. Ga. 1985); *Mohawk Indus. v. Robinson Indus.*, 46 Bankr. 464 (Bankr. D. Mass. 1985).

135. 28 U.S.C.A. § 157(c)(1) (West Supp. 1985).

objected.”¹³⁶ Apparently, the key change is that a district court now must review de novo a narrow line of matters—those in non-core proceedings in which the parties have not consented to adjudication by the bankruptcy court and to which a party has specifically and timely objected.

B. Treatment of a Northern Pipeline Claim Under the 1984 Amendments

An obvious question is how a claim similar to the claim asserted in *Northern Pipeline* will be treated under the new provisions of the 1984 Amendments. *Northern Pipeline* involved the assertion of state law claims by a debtor against a party who had no claim against the debtor's estate.¹³⁷ It seems likely that Congress intended such a claim to be considered a proceeding “related to” the case under Title 11, not a “core” proceeding under the new provision.¹³⁸ Assuming this would be the determination, a bankruptcy judge could hear the claim but could only enter proposed findings of fact and conclusions of law.¹³⁹ The district court judge would then consider the findings and review de novo the matters to which any of the parties specifically and timely objected.¹⁴⁰ It appears that the Marathon Pipe Line Company objected to the jurisdiction of the bankruptcy judge.¹⁴¹ Assuming a party has timely and specifically objected, the non-article III bankruptcy judge is not empowered by the Amendments to enter a final judgment.¹⁴² The district court is required to review the proposed findings and conclusions of law de novo.¹⁴³ Hence, in a situation like *Northern Pipeline*, the Amendments provide that the article III district court will be the court actually exercising the federal judicial authority.

Apparently Congress has heeded the advice of Chief Justice Burger in adopting the 1984 Amendments. In his dissenting opinion he advised:

It will not be necessary for Congress, in order to meet the requirements of the Court's holding, to undertake a radical restructuring of the present system of bankruptcy adjudication. The problems arising from [the *Northern Pipeline*] decision can be resolved simply by providing that ancillary common-law actions, such as the one involved in [*Northern Pipeline*], be routed to the United States district court of which the bankruptcy court is an adjunct.¹⁴⁴

The new provisions were written narrowly, as Chief Justice Burger advised, to require only that a certain class of claims—non-core proceedings with respect to which a party specifically and timely objects to the bankruptcy court's jurisdiction—be reviewed de novo by an article III district court judge.

136. *Id.*

137. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56 (1982). *Northern's* suit included claims for breach of contract, breach of warranty, misrepresentation, coercion, and duress.

138. See 28 U.S.C.A. § 157(c)(1) (West Supp. 1985).

139. *Id.*

140. *Id.*

141. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 56–57 (1982).

142. 28 U.S.C.A. § 157(c)(1) (West Supp. 1985).

143. *Id.*

144. *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92 (1982) (Burger, C.J., dissenting).

Justice Brennan noted in *Northern Pipeline* that “the ‘adjunct’ bankruptcy courts created by the [Reform] Act exercise jurisdiction behind the facade of a grant to the district courts”¹⁴⁵ This may indicate that Justice Brennan, at least, will not accept the mere form of “adjunct” bankruptcy courts, as structured in the Amendments, over the substance of the substance of the courts’ actual operation and the nature of claims the bankruptcy courts actually determine.¹⁴⁶ He further rejected the appellants’ suggestion that article III is satisfied as long as there is some degree of judicial review.¹⁴⁷ He said:

That suggestion is directly contrary to the text of our Constitution . . . [because article III provides that] [t]he Judges, *both* of the supreme and inferior Courts . . . [shall have life tenure and protections from salary reductions] [T]he constitutional requirements . . . must be met at all stages of adjudication, and not only on appeal¹⁴⁸

Justice Rehnquist stated that he was “likewise of the opinion that the extent of review by Art. III courts provided on appeal from a decision of the Bankruptcy Court in a case such as *Northern’s* does not save the grant of authority to the latter”¹⁴⁹

Though it is possible that the *de novo* review provided by the Amendments would be sufficient to meet constitutionality in Justice Rehnquist’s view, constitutionality is far from certain. While Justice Rehnquist’s view was that traditional appellate review by an article III court was insufficient to save the jurisdiction of the bankruptcy system after the Reform Act, he gave no indication whether *de novo* review of certain matters, such as those to which a party specifically and timely objects, would be enough to meet the requirements of article III.¹⁵⁰ Given Justice Brennan’s statement in footnote 39 and his finding of a mere “facade” of adjunctness in the Reform Act, it is not at all certain that the narrow *de novo* review provided for in the 1984 Amendments will pass constitutional muster.¹⁵¹

C. Inadequacies of the Attempt to Assure the Adjunct Character of the Bankruptcy System

The changes in the jurisdiction of the bankruptcy courts imposed by the 1984 Amendments, which attempt to assure that the bankruptcy courts are adjunct to the district courts, are inadequate for a number of reasons. Bankruptcy litigants still do not have the opportunity to receive an efficient determination of all the issues in a single forum. An important goal of the Reform Act was eliminating fragmented jurisdiction and the resulting costly and time-consuming litigation over jurisdiction prevalent in the pre-1978 bankruptcy system.¹⁵² The 1984 Amendments have not achieved this goal.¹⁵³ Litigation will be required to determine if a proceeding is a

145. *Id.* at 86.

146. *Id.*

147. *Id.* at n.39.

148. *Id.* (emphasis in original).

149. *Id.* at 91.

150. *See id.* at 91–92.

151. *Id.* at 86, n.39.

152. *See Hearings, supra* note 5, at 273.

153. *See supra* note 113.

"core" proceeding or a "related" proceeding.¹⁵⁴ Since the bankruptcy judge is to make the determination whether a proceeding is core or related, appeals and litigation will result merely over whether a bankruptcy court has jurisdiction to make the determination.¹⁵⁵ Any litigant who would rather be in state court or who might benefit from using protracted delay as a bargaining chip will probably litigate this jurisdictional issue. The bankruptcy system will be plagued with costly, unnecessary, and inefficient litigation similar to the litigation over the plenary/summary distinction that plagued the referee system.

Indeed, the new provisions will add to the piecemeal litigation of bankruptcy claims. The district court can now withdraw a proceeding from the bankruptcy court at any time for any reason.¹⁵⁶ In addition, the Amendments contain a provision that appears to require a district court to withdraw a proceeding which requires interpretation of Title 11 and other federal laws,¹⁵⁷ further fragmenting jurisdiction. This fragmentation does not further the Reform Act's goal of allowing a single bankruptcy to be tried efficiently in a single forum.

The 1984 Amendments do not upgrade the status of bankruptcy judgeships. The bankruptcy courts are placed even more under the thumb of the district courts than before. The Amendments fail to recognize the role which the bankruptcy system plays in commercial law. As a result, it will be more difficult to attract highly qualified individuals to the bankruptcy bench.¹⁵⁸ Given the volume and importance of bankruptcy litigation, this measure may dilute the quality of the federal bench far more than installing article III bankruptcy courts would.¹⁵⁹

The lack of a clear majority position in *Northern Pipeline* makes it difficult to predict whether the bankruptcy court system as amended is constitutional.¹⁶⁰ It is

154. See, e.g., *In re Morse Elec. Co.*, 47 Bankr. 234, 236-37 (Bankr. N.D. Ind. 1985) (finding debtor's claims "non-core" but "related"); *In re Lion Capital Group*, 46 Bankr. 850-54 (Bankr. S.D.N.Y. 1985); *Macon Prestressed Concrete Co. v. Duke*, 46 Bankr. 727, 730 (Bankr. M.D. Ga. 1985); *Mohawk Indus. v. Robinson Indus.*, 46 Bankr. 464 (Bankr. D. Mass. 1985); *In re Illinois-California Express, Inc.*, 50 Bankr. 232 (Bankr. D. Colo. 1985).

155. See 28 U.S.C.A. § 157(b)(3) (West Supp. 1985).

156. *Id.* § 157(d). "The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown." *Id.* (emphasis added).

157. *Id.* "The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." *Id.* (emphasis added). The legislative history on the Amendments is sparse and sheds little light on the purpose of this provision. James Chatz, president of the Commercial Law League, and Brooke Schumm III speculated that the intent was probably to keep major anti-trust cases from being adjudicated in the bankruptcy court. Chatz & Schumm, *1984 Bankruptcy Code Amendments—Fresh from the Anvil*, 89 COM. L.J. 317, 321 (1984).

158. Opponents of a more independent bankruptcy court system argued that it would be more difficult to attract high quality individuals to become district court judges because the prestige of a position on the federal bench would be diluted if bankruptcy judges were given article III protections. Rifkind, *Bankruptcy Code—Specialized Court Opposed*, 52 AM. BANKR. L.J. 187, 189-90 (1978). Rifkind maintains there has not been any problem attracting the sufficient quality of persons to become bankruptcy judges despite the lack of status and prestige. *Id.* at 190. His argument is refuted by Professor King. See King, *Bankruptcy Code—Specialized Court Supported*, 52 AM. BANKR. L.J. 193, 195-96 (1978).

159. Between July 1, 1982, and July 1, 1983, more bankruptcy cases were filed in the federal courts than civil and criminal proceedings combined. See *supra* notes 42-43 and accompanying text.

160. At the time of this writing, one court had already held the Amendments unconstitutional under *Northern Pipeline*. *In re Associated Grocers of Nebraska Coop., Inc. v. Nabisco Brands*, 46 Bankr. 173 (Bankr. D. Neb. 1984). The court interpreted the plurality opinion in *Northern Pipeline* as allowing non-article III judges to hear only purely public rights, holding that a contested preference payment was not such a public right. See 28 U.S.C.A. § 157(b)(2)(F) (West Supp. 1985).

interesting to note that the 1984 Amendments take the solution suggested in Chief Justice Burger's dissent.¹⁶¹ Constitutionality is ostensibly met by measures purportedly assuring that bankruptcy courts are truly adjuncts of the district court.¹⁶² In theory, the district courts are exercising the judicial power, but it is unclear whether this position will meet the approval of a majority of the Supreme Court. An opposing view, which the Court may well take, is that the policy of article III is to assure that the federal judiciary is independent.¹⁶³ Without the protections of life tenure and salary guarantees, the independence of the bankruptcy courts can not be assured. Moreover, if the provision for de novo review in the article III district courts is not exercised with diligence, the mere form of this supposed constitutional protection should not prevail over the substance of the situation.¹⁶⁴ The constitutional requirement of article III may not be satisfied merely by purporting to place the judicial authority in the district courts.

VI. CONCLUSION

The problems in the bankruptcy court system have not been solved by the 1984 Amendments. The jurisdiction and status of the bankruptcy court system are simply not commensurate with the role the system plays in the federal judiciary or in commerce today. Rather than solving the problems, the 1984 Amendments create more. The ambiguity of such provisions as "core" and "non-core" proceedings will result in distinctions difficult to apply and senseless uncertainty over what cases the bankruptcy system can determine.¹⁶⁵ The provisions addressing abstention and revocation of referral will result in piecemeal litigation of bankruptcy cases in multiple forums. Bankruptcy litigants will continue to be plagued with wasteful disputes over jurisdiction.¹⁶⁶ Instead of taking a step forward from the problems caused by the "flawed compromise" in the Reform Act, the restrictive jurisdiction of the 1984 Amendments is a step back toward the troubled pre-Reform Act system.¹⁶⁷

161. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 92 (1982) (Burger, C.J., dissenting). The Chief Justice joined in the dissenting opinion of Justice White, but he wrote separately to emphasize that the Court's holding was limited to the narrow proposition that a state common law action not made subject to a federal rule of decision and not directly related to an adjudication of bankruptcy under federal law, absent the consent of the litigant, could only be heard by an article III federal court. *Id.* See *supra* notes 147-54 and accompanying text.

162. For the proposition that the requirements of article III are strict, see Krattenmaker, *supra* note 4 and Currie, *Bankruptcy Judges and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983). Chairman Rodino of the House Subcommittee on Monopolies and Commercial Law has noted:

The Judiciary Committee and Civil Rights Subcommittee gave lengthy consideration to the constitutional issues surrounding the court system in both the 94th and 95th Congresses, concluding that the limited circumstances in which a departure from the requirements of article III have been permitted were not present in the bankruptcy context. The original bankruptcy bill passed by the House, H.R. 8200, 95th Congress, created the bankruptcy courts as article III courts.

Bankruptcy Court Act of 1982: Hearings on H.R. 6109 before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 97th Cong., 2d Sess. 1 (1982) (statement of Chairman Rodino).

163. See generally Currie, *supra* note 162.

164. See *supra* notes 141-48 and accompanying text.

165. See 28 U.S.C.A. § 157 (West Supp. 1985).

166. See *supra* note 110.

167. See *supra* text accompanying note 110.

It is far from certain that the Amendments meet the constitutional requirements of article III. The lack of a majority in *Northern Pipeline* makes it difficult to say what changes the Supreme Court will consider sufficient to place bankruptcy courts safely within the constitutional restrictions of article III.¹⁶⁸ The history of the congressional power to establish article I courts sheds little light on the subject.¹⁶⁹ For years, the courts have had a difficult time enunciating a coherent standard delineating when Congress has gone too far in delegating the judicial power.¹⁷⁰ The theoretical distinctions put forth in the past have been strained and widely criticized, and the various analyses by the present court have been "productive of much confusion and controversy."¹⁷¹ The major problem may be that the clear and simple wording of article III means precisely what it says: federal courts must have the protections of life tenure and a prohibition against salary decreases, so that the independent exercise of the judicial power is assured, free from any danger of encroachment by another branch of the federal government holding the purse strings or employment contract.¹⁷² Whether the Supreme Court will consider the measures adopted in the 1984 Amendments sufficient to bring the bankruptcy court system into compliance with article III remains to be seen.

Congress could have solved many problems by reestablishing the bankruptcy court system with judges having article III status. The inadequacies of the present bankruptcy system outweigh the costs of reestablishing it as an article III system. Litigants could have their cases tried quickly and efficiently in courts of certain and competent jurisdiction. High quality judges could be attracted to the bankruptcy bench. The bankruptcy system could do what it was intended to do, without the burden of wasteful litigation over jurisdictional squabbles. Perhaps most importantly, constitutionality could have been assured. With the constitutional uncertainty trailing in the wake of *Northern Pipeline*, it is quite possible, if not probable, that Congress will once again have the chance to restructure the bankruptcy court system. Perhaps then article III status for the judges will be reconsidered as the best way to recognize the role of the bankruptcy system and to comply with the requirements of article III.

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168. See generally Redish, *supra* note 46; Fullerton, *supra* note 47.

169. *Id.*

170. *Id.*

171. *Glidden Co. v. Zdanok*, 370 U.S. 530, 534 (1962).

172. Krattenmaker phrased the question, "does article III, section one mean what it says?" Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L.J. 297, 313 (1981). See also *id.* at 299. For a historical perspective of the purpose and application of article III, see Currie, *supra* note 162.

